

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   TOBY DOUGLAS, DIRECTOR, CALIFORNIA :

4   DEPARTMENT OF HEALTH CARE SERVICES, :

5                   Petitioner                                 :   No. 09-958

6                   v.   :

7   INDEPENDENT LIVING CENTER OF                                 :

8   SOUTHERN CALIFORNIA, INC., ET AL.                             :

9   - - - - -x

10   and

11   - - - - -x

12   TOBY DOUGLAS, DIRECTOR, CALIFORNIA :

13   DEPARTMENT OF HEALTH CARE SERVICES, : \

14                   Petitioner                                 :   No. 09-1158

15                   v.   :

16   CALIFORNIA PHARMACISTS ASSOCIATION, :

17   ET AL.   :

18   - - - - -x

19   and

20   - - - - -x

21   TOBY DOUGLAS, DIRECTOR, CALIFORNIA :

22   DEPARTMENT OF HEALTH CARE SERVICES, :

23                   Petitioner                                 :   No. 10-283

24                   v.   :

25   SANTA ROSA MEMORIAL HOSPITAL,                                 :

1 ET AL. :

2 - - - - -x

3 Washington, D.C.

4 Monday, October 3, 2011

5

6 The above-entitled matter came on for oral  
7 argument before the Supreme Court of the United States  
8 at 10:05 a.m.

9 APPEARANCES:

10 KARIN S. SCHWARTZ, ESQ., Supervising Deputy Attorney  
11 General, San Francisco, California; on behalf of  
12 Petitioner.

13 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
14 Department of Justice, Washington, D.C.; for United  
15 States, as amicus curiae, supporting Petitioner.

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf  
17 of Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 09-958,  
5 Douglas v. Independent Living Center of Southern  
6 California, and the consolidated cases.

7 Ms. Schwartz.

8 ORAL ARGUMENT OF KARIN S. SCHWARTZ

9 ON BEHALF OF THE PETITIONER

10 MS. SCHWARTZ: Mr. Chief Justice, and may it  
11 please the Court:

12 There are many reasons why this Court should  
13 not recognize a private cause of action to enforce  
14 30(A), and I'd like to focus on three. First, the  
15 separation of powers. Congress controls who can enforce  
16 Federal law, and it has not provided for -- for private  
17 enforcement of 30(A). Instead, it has provided for  
18 administrative enforcement.

19 Second is the Spending Clause context in  
20 which the case arises. The very legitimacy of Spending  
21 Clause legislation depends on the States' voluntary and  
22 knowing acceptance of its obligations. For this reason,  
23 if Congress wants to provide for private party  
24 litigation, it must do so clear and unambiguously, and  
25 it has not done so in this case.

1                   And third is the language of 30(A) itself,  
2   which is broad and undefined and which includes  
3   competing policy interests. These are suited to  
4   administrative enforcement, with all the expertise and  
5   judgment and discretion and administrative know-how that  
6   can be brought to bear.

7                   These three principles all focus -- all  
8   point to one conclusion -- that section 30(A) is not  
9   enforceable.

10                  JUSTICE GINSBURG: Ms. Schwartz, the  
11   government doesn't have the injunctive power. As far as  
12   California's rates are concerned, California puts them  
13   into effect. The government can't stop that from  
14   happening, even if the government thinks that they are  
15   in violation of the Medicaid Act; is that right?

16                  MS. SCHWARTZ: No, Your Honor, it -- it is  
17   not. I mean, in the sense that it can't go out  
18   immediately and get an injunction, Your Honor is  
19   correct. However, the government has the power to deny  
20   a State --

21                  JUSTICE GINSBURG: Yes, but that's a very  
22   drastic remedy that's going to hurt the people that  
23   Medicaid was meant to benefit. Does the government have  
24   any injunctive power, or is its only -- only remedy a  
25   fund cutoff?

1 MS. SCHWARTZ: Well, its only remedy  
2 provided by statute is to terminate funds. However, it  
3 is not a drastic remedy; it -- and it is the remedy  
4 that's provided by statute.

5 JUSTICE GINSBURG: How often has it  
6 happened?

7 MS. SCHWARTZ: How often does it happen?

8 JUSTICE GINSBURG: How -- how often has in  
9 the Medicaid context --

10 MS. SCHWARTZ: Very rarely, and the reason  
11 for that is because the way that most State plan  
12 amendments operate is that these issues are resolved on  
13 a consensual basis, generally within the 90 days  
14 provided by regulation. This case is the exception that  
15 proves the rule.

16 JUSTICE KAGAN: Well, Ms. Schwartz, isn't it  
17 the exception because in fact you end-run -- end-ran the  
18 administrative process, that you put your regulations,  
19 your new rate schedules, into effect even before you  
20 submitted them to HHS, and continued them in effect  
21 while HHS was considering them, and continued them in  
22 effect to the extent that you were allowed to do so by  
23 injunction, even after HHS disapproved them?

24 MS. SCHWARTZ: There is no end run here  
25 because HHS's own regulations provide that our time for

1 submitting the State -- State plan amendment is within  
2 the 90 days that the amendment will take effect, and HHS  
3 will confirm that -- and this was the position of the  
4 Federal Government that the State may implement its rate  
5 reductions while the State plan amendment is pending.  
6 It does so at the risk that, if a State plan amendment  
7 is disapproved, that it may have to pay additional  
8 funds. But we did not do an end run around anything.  
9 We are entirely consistent with the administrative  
10 process.

11 JUSTICE KENNEDY: Could a State in its own  
12 courts provide for procedures whereby adversely affected  
13 parties could test the regulation?

14 MS. SCHWARTZ: I don't believe so. And  
15 that's because in --

16 JUSTICE KENNEDY: It seems to me you have to  
17 say that. Otherwise the next question would be under  
18 Gonzaga, you wouldn't say that a State can entertain a  
19 monetary cause of action. So, I think that's consistent  
20 with your position.

21 MS. SCHWARTZ: Well, and I think what's very  
22 important to focus on here is that this is not just any  
23 Federal statute that's being enforced, but it is a  
24 Spending Clause provision that is vague and ambiguous in  
25 its terms. It cries -- it has all these policy elements

1 to it, and it cries out for administrative review.

2 JUSTICE KENNEDY: Well, when you say -- that  
3 brings me to a slightly different point. You -- you  
4 introduce the fact or the consideration of what's  
5 administratively workable. The brief by the former HHS  
6 officials says quite to the contrary. It -- it says  
7 that there are almost \$400 billion of HHS expenditures  
8 that are supervised by 50 people. That works out to 800  
9 million each; and they say, we don't have time for this.  
10 And it's much more efficient and it's much more  
11 consistent with the application of -- proper application  
12 of Federal law to allow this action to be brought in the  
13 -- in the courts.

14 MS. SCHWARTZ: I have two answers, Your  
15 Honor. One is that I don't think it is more efficient  
16 to have 700 district court judges interpreting a statute  
17 that does not have any objective standard but that is  
18 susceptible to many different interpretations.

19 JUSTICE KAGAN: Well, Ms. Schwartz, the  
20 agency --

21 JUSTICE KENNEDY: Well, I mean, that's "the  
22 sky is falling" -- 700 judges. It would be just each  
23 district if it were in every district. And it -- it --  
24 and certainly to the extent we are involving a State,  
25 there would be only one State involved. So -- so, there



1 is just the State of California, and there are only four  
2 districts there, and the suit could only be brought in  
3 one. So, I -- I think that's an -- you know, I don't  
4 think that the "sky is falling" argument really works.

5 MS. SCHWARTZ: But California is now subject  
6 to standards that don't apply anywhere else in the  
7 country, and I believe the Court acknowledged exactly  
8 this problem just last term in *Astra v. Santa Clara* when  
9 it declined to allow private parties to use a contract  
10 provision to do an end run around *Gonzaga*,  
11 *Sandoval* versus -- *Sandoval v. Alexander*; I think I have  
12 that reversed -- and the other cases that, based on  
13 separation of powers of principles, based on Spending  
14 Clause principles, limit the -- the circumstances in  
15 which private parties can sue.

16 JUSTICE ALITO: Are you asking us to adopt a  
17 rule that is good for this one case only?

18 MS. SCHWARTZ: Abso --

19 JUSTICE ALITO: You gave -- or is there --  
20 could you state the rule in broader terms or more  
21 neutral terms?

22 And you gave three reasons why we should  
23 reverse. One, Congress hasn't created a cause of action  
24 here. Well, Congress has never created causes of  
25 action, never creates a cause of action in any case in

1 the Ex parte Young line or cases like that.

2 The Supremacy Clause, because this is a  
3 Spending Clause -- this was an act under the Spending  
4 Clause. But you're not asking us to hold that a  
5 Spending Clause legislation can never pre-empt State  
6 legislation, I take it.

7 And then the language of 30(A), where you --  
8 are you arguing that 30 -- that the Medicaid Act  
9 affirmatively precludes any action like this? I don't  
10 understand that -- is -- is any of those arguments  
11 sufficient by itself, or do you have to take them all  
12 together, and you're asking for a rule that only applies  
13 here?

14 MS. SCHWARTZ: All of the -- all of those  
15 arguments are sufficient, as is the fact that, as we've  
16 briefed, the Supremacy Clause doesn't supply a cause  
17 of action. But let me focus on those three points.

18 These are points -- the rule that we are  
19 seeking is that a Federal statute is not enforceable  
20 unless Congress intended for it to be enforceable and  
21 that that principle has special force with respect to  
22 Spending Clause provisions where Congress has to clearly  
23 and unambiguously provide for that enforcement, because  
24 the State has to be on fair notice, due to the nature of  
25 the Spending Clause, of the obligations to which it is

1 agreeing. That is Pennhurst. And that is applied with  
2 even greater force with respect to 30(A) because of the  
3 type of standards that it incorporates.

4 If it's not suitable for -- if a  
5 determination applying Gonzaga is that you're -- if  
6 you're finding under 1983 the administrative nature and  
7 flexible nature of those standards is not appropriate  
8 for private enforcement, that shouldn't matter what  
9 vehicle you are using to bring the case.

10 And I want to just -- to put this into real  
11 clear context. In the 3 years that this case has been  
12 pending, California has submitted 68 State plan  
13 amendments outside of the rate context. Thirty-six of  
14 them were approved. The rest were withdrawn  
15 voluntarily. These cases -- and they were all approved,  
16 almost all of them, within the 90-day period. But  
17 the --

18 JUSTICE SOTOMAYOR: Excuse me. Were  
19 those --

20 MS. SCHWARTZ: -- administrative process  
21 works.

22 JUSTICE SOTOMAYOR: Were those amendments  
23 submitted before they took effect or after they had  
24 taken affect, like here?

25 MS. SCHWARTZ: I don't know the answer to

1 that question. These are non-rate -- rate-related  
2 amendments, State plan amendments. But the point is the  
3 administrative process is working. We obtained -- and  
4 it resolves, in the usual case, in a consensual  
5 resolution that is consistent with the cooperative  
6 nature of the joint venture between --

7 JUSTICE SOTOMAYOR: I'm --

8 MS. SCHWARTZ: -- the States and the Federal  
9 Government.

10 JUSTICE SOTOMAYOR: That's where I'm a  
11 little bit confused. The injunction here only stopped  
12 you from implementing the rate changes until you got  
13 approval from HHS in its administrative process that it  
14 was going to approve the amendment, correct?

15 MS. SCHWARTZ: No, I don't believe the  
16 injunctions were that limited. And so, if we obtained  
17 State plan approval, we then would have to go back to  
18 the court and argue over what the impact is of -- of the  
19 State plan.

20 JUSTICE SOTOMAYOR: That's a separate  
21 question about whether the courts are required to give  
22 deference to an HHS finding. But the injunction here  
23 wasn't one that said you could never do this. It just  
24 said go finish the process, right?

25 MS. SCHWARTZ: No, the injunctions were not

1 so conditional. And the -- and the point I want to make  
2 is the injunctions have disrupted the administrative  
3 process as it is intended to work by drawing out the  
4 process, by politicizing the process, by prejudicing our  
5 ability to get State plan approval because now there's  
6 the concern about what about retroactive relief when  
7 they approve your State plan --

8 JUSTICE KENNEDY: Well, the courts, I take  
9 it, have the prerogative, perhaps even the obligation,  
10 under the primary jurisdiction rationale to simply  
11 withhold adjudication until the agency acts.

12 MS. SCHWARTZ: And we requested that in some  
13 of these cases, and the courts ignored that argument.  
14 And so, the upshot is that we are now --

15 JUSTICE KENNEDY: But that's an abuse of  
16 discretion, not an absence of power. You're arguing an  
17 absence of power.

18 MS. SCHWARTZ: Well, there is no cause of  
19 action. That's correct, Your Honor. Our position is  
20 that there is no cause of action here. The --

21 JUSTICE KAGAN: Can I go back to the  
22 question that Justice Alito asked you about why there's  
23 no cause of action? You are asking us to treat the  
24 Supremacy Clause differently from every other  
25 constitutional provision. Why should we?

1 MS. SCHWARTZ: Well, for several reasons,  
2 Your Honor. First, when -- what you're doing here, what  
3 the Court is doing here, is enforcing a Federal statute.  
4 You look through the Supremacy Clause to the  
5 obligation that --

6 JUSTICE KAGAN: The Supremacy Clause is part  
7 of the Constitution.

8 MS. SCHWARTZ: It is.

9 JUSTICE KAGAN: And the Petitioners here --  
10 excuse me. The -- the plaintiffs here essentially said  
11 that the Supremacy Clause as part of the Constitution  
12 had been violated and sought, not damages, but only a  
13 prospective injunction. And the question is, why the  
14 court shouldn't do what the court has done many, many,  
15 many times before, tens and tens and tens of times  
16 before, and say, yes, that's our prerogative and we'll  
17 proceed to the merits?

18 MS. SCHWARTZ: Two points, Your Honor.  
19 First, they did seek damages, and they obtained damages  
20 in Independent Living. And second is the obligations  
21 that are imposed, the study requirement, the data  
22 requirement, all these obligations are imposed by 30(A).  
23 You look through the Supreme Clause to the statute to  
24 see the obligations. And so, the question is, does  
25 Congress get to control who enforces those obligations

1 or not?

2 JUSTICE KAGAN: In a -- in a cause of -- in  
3 a suit that's brought under a statute directly, a person  
4 could be claiming damages. Here that is not the case.  
5 A person is only claiming injunctive relief. And that  
6 should -- there should be a difference between those two  
7 in terms of when the cause of action is available.

8 MS. SCHWARTZ: First, just one point: In  
9 Independent Living, they did claim damages, and they  
10 obtained damages. But setting that issue aside, no,  
11 Your Honor, this Court has -- has the obligation and the  
12 right with respect to constitutional provisions to  
13 determine how they will be enforced subject potentially  
14 to congressional action, but there is far more latitude  
15 for the Court. With respect to statutes, of course, as  
16 this Court is explained in Davis v. Passman, deference  
17 to congressional intent is appropriate. And here --

18 JUSTICE ALITO: Well, suppose the plaintiffs  
19 here were facing an imminent State enforcement action.  
20 Would your argument be different?

21 MS. SCHWARTZ: Well, if -- if the plaintiffs  
22 fell within -- yes. And if the plaintiffs fell within  
23 the bill in equity to restrain enforcement proceedings  
24 that was at issue in Ex parte Young and that Justice  
25 Kennedy has discussed in terms of the immunity to

1     invalid regulation, then the result would be different.

2     But there are several reasons why --

3                 JUSTICE ALITO:   But how does that square  
4     with the argument that you made that -- relying on  
5     separation of powers, the Spending Clause, and the  
6     language of 30(A)? All of those are still in play --

7                 MS. SCHWARTZ:   For a couple --

8                 JUSTICE ALITO:   -- in that situation.

9                 MS. SCHWARTZ:   Well, for a couple of  
10    different reasons. First of all, a defense, which is  
11    what you're asserting in such a case, is not a cause of  
12    action. And so, it doesn't implicate the separation of  
13    powers concerns to the same degree as a stand-alone  
14    cause of action to compel the State to comply with an  
15    obligation owed to another entity.

16                Also, in those cases, there -- in the equity  
17    cases -- equity doesn't provide a remedy just for an  
18    injury. You have to have an invasion of what in old  
19    times was called a primary right. But what that means  
20    is a right to property or a right in the person. And  
21    there were other kinds of primary rights, but --

22                JUSTICE GINSBURG: But what about the  
23    providers who say, but under -- under the State law, if  
24    we charge more than the hospitals -- if we charge more  
25    than the State ceiling, we are subject to sanctions, so



1 this does fit into the category of anticipatory  
2 defenses?

3 MS. SCHWARTZ: No, it does not, because we  
4 have not threatened to enforce that statute. They are  
5 not arguing that statute is -- is pre-empted. They --  
6 the -- the statute that they are --

7 JUSTICE GINSBURG: But wouldn't they be --  
8 the rates go into effect. Someone charges more on the  
9 theory that the rates are impermissible under the  
10 Supremacy Clause. That person would be subject to  
11 sanction under State law.

12 MS. SCHWARTZ: And that would be a different  
13 case, and it would be a closer case, although even in  
14 that context, because of the Spending Clause context in  
15 which the case arises, I don't believe that they would  
16 be able to challenge that under the Supremacy Clause.

17 But that is not this case. That case at  
18 least presents the fact -- and the reason why it's a  
19 closer case is because in that case there is regulation  
20 and we are potentially infringing on their property.  
21 However, what's the law that they are trying to assert  
22 defensively there? It is -- it's a Spending Clause  
23 provision that has administrative standards, that's been  
24 entrusted to Congress. So, shouldn't Congress be able  
25 to enforce it? Fundamentally, this Court --

1 JUSTICE SCALIA: Excuse me. You spoke of  
2 that, Justice Ginsburg's question, as though it was a  
3 hypothetical. But that could happen, couldn't it? What  
4 if one of these Respondents charged more than the State  
5 law permits? Wouldn't -- wouldn't the State move  
6 against them?

7 MS. SCHWARTZ: Of course, we would, and they  
8 would have a decision about whether to stay in the  
9 Medicaid program or not. But the question is, does this  
10 Court exercise its equitable powers to create a cause of  
11 action directly that Congress itself has not? That's  
12 really the question for this Court.

13 In the Spending Clause context with respect  
14 to this kind of standard that is suited for  
15 administrative standards, we submit you should not.

16 Unless there are any further questions, Your  
17 Honor, I'd like to reserve our remaining time for  
18 rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Kneedler.

21 ORAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

24 MR. KNEEDLER: Mr. Chief Justice and may it  
25 please the Court:

1 Medicaid is a cooperative program between  
2 the Federal Government and the States. Congress has not  
3 created a cause of action under that Act for private  
4 parties to enforce particular provisions of it.

5 Nor does paragraph 30(A) confer private  
6 rights that are enforceable under 1983. Rather,  
7 paragraph 30(A) is written in general terms that  
8 describe the general undertaking by the State in its  
9 bilateral relationship with the Federal Government.

10 CHIEF JUSTICE ROBERTS: Mr. Kneedler, is  
11 your argument in this case limited to Spending Clause  
12 legislation?

13 MR. KNEEDLER: Yes. And what --

14 JUSTICE SOTOMAYOR: And if it's not, could  
15 you please -- you said yes, it is.

16 MR. KNEEDLER: Yes.

17 JUSTICE SOTOMAYOR: But give me the  
18 theoretical foundation. The Supremacy Clause doesn't --  
19 I'm assuming you agree with your -- with Petitioner that  
20 it doesn't provide for a cause of action.

21 MR. KNEEDLER: Yes.

22 JUSTICE SOTOMAYOR: Is that your position?

23 MR. KNEEDLER: Yes.

24 JUSTICE SOTOMAYOR: Then what gets all of  
25 the cases that we've had since 1824 into this Court that

1 have granted injunctive relief on supremacy arguments?

2 MR. KNEEDLER: I -- I think that the great  
3 majority of those cases are ones in which the plaintiff  
4 in the suit in equity is bringing an action anticipating  
5 an action at law. And there --

6 JUSTICE SOTOMAYOR: Well, but we -- we have  
7 plenty that don't: King, Townsend, Carlson. We've had  
8 many others that are not dissimilar --

9 MR. KNEEDLER: They --

10 JUSTICE SOTOMAYOR: -- to this case.

11 MR. KNEEDLER: I think that they -- though  
12 that they do not reflect a general assumption that there  
13 is a cause of action directly under the Supremacy  
14 Clause, because as this Court said, the Supremacy Clause  
15 is not itself a source of rights --

16 JUSTICE SOTOMAYOR: So, go back and explain  
17 to me how all of those cases --

18 MR. KNEEDLER: To -- I -- I think --

19 JUSTICE SOTOMAYOR: What's the theoretical?

20 MR. KNEEDLER: I think there is -- I think  
21 one has to look to an equitable cause of action, which I  
22 think is the way Ex parte Young describes what was going  
23 on in that -- in that way, as anticipating -- it was a  
24 defense anticipating an action at law.

25 JUSTICE SOTOMAYOR: So, go to your --

1     Petitioner's response to one of my colleagues, to  
2     Justice Scalia, when she said yes, if these providers  
3     decide to charge the old rate to their patients, the  
4     State will go after them. How is that any different  
5     than the cases where we're talking about railroads  
6     charging -- not charging customers more than a State  
7     commands because the penalty's too high, or --

8                     MR. KNEEDLER: I --

9                     JUSTICE SOTOMAYOR: -- or those types of  
10    cases that fall into this pre-emptive category that  
11    you're talking about?

12                    MR. KNEEDLER: That has not been plaintiffs'  
13    theory of this case. They have not said we're going to  
14    resort to self-help and charge more than the State  
15    allows. What they -- what they want to do is they  
16    brought this suit to challenge the rates in the first  
17    instance. They are not claiming that they're going to  
18    violate State law and charge more; they are simply  
19    wanting to challenge the rates that the State is  
20    charging. What --

21                    JUSTICE SOTOMAYOR: But you haven't  
22    explained how that's theoretically different than the  
23    example I just gave you.

24                    MR. KNEEDLER: Yes, I think it is, and if I  
25    could explain why --

1 JUSTICE SCALIA: So, all they have to do, as  
2 far as the Government is concerned, is amend their  
3 complaint to say: We intend to charge higher rates than  
4 the State law allows.

5 MR. KNEEDLER: And I --

6 JUSTICE SCALIA: And then you -- you'd agree  
7 that the suit would lie.

8 MR. KNEEDLER: I'm -- I'm not sure. There  
9 would be further questions that would arise in that  
10 context. For example, I don't know whether -- whether a  
11 -- whether in a prosecution under the statute for  
12 charging -- that prohibits charging more than State regs  
13 allow, whether you can raise as a defense in that  
14 prosecution a challenge to the validity of the rates.

15 JUSTICE SCALIA: Well, gee, we're not  
16 deciding a whole lot here, then. Just -- it's just a  
17 matter of pleading that we're deciding, right?

18 MR. KNEEDLER: Well, that's why I'm saying  
19 there might be a further question in -- in what you're  
20 describing as to whether that would be a valid defense  
21 in the State prosecution, because I can certainly  
22 imagine the State saying: We don't want our rates  
23 tested in individual criminal prosecutions any more than  
24 we would want them tested in affirmative --

25 JUSTICE KAGAN: Mr. Kneedler, why should

1    this even matter so much whether there's a defense  
2    available in a regulation that's brought against a  
3    person or not? In your brief, you admit that there are  
4    numerous cases that don't fit within that category,  
5    where the -- but where the -- where the State has acted  
6    in some sense to change the behavior of the person, to  
7    regulate the person, even if that person doesn't have a  
8    proceeding in which to mount a defense. And we -- this  
9    Court has treated those cases in exactly the same way,  
10   haven't they?

11                   MR. KNEEDLER: Yes, unexamined. And let me  
12   say, we are not challenging those cases. And the Court,  
13   we think, doesn't need to look more broadly to a theory.  
14   We are -- to -- to an all-encompassing theory. We are  
15   focusing on Spending Clause legislation in a particular  
16   cooperative Federal/State program --

17                   CHIEF JUSTICE ROBERTS: So, you think --

18                   MR. KNEEDLER: -- under the Spending Clause.

19                   CHIEF JUSTICE ROBERTS: So, you think there  
20   may well be implied rights of action outside the  
21   Spending Clause context.

22                   MR. KNEEDLER: I think probably the best way  
23   to explain it is equitable cause of action drawing on  
24   the courts' traditional equitable jurisdiction. You  
25   could call that an implied cause of action under the

1     Supremacy Clause, but I think, historically, it's been  
2     described as an --

3                     CHIEF JUSTICE ROBERTS:    So --

4                     MR. KNEEDLER:    -- exercise of the courts'  
5     equitable authority.  The court has equitable  
6     discretion, and we think, because of the Spending Clause  
7     nature of this legislation, it should not create the  
8     cause of action --

9                     CHIEF JUSTICE ROBERTS:    So, your -- your  
10    answer to my earlier question was that you're not  
11    arguing about that in this case.

12                    MR. KNEEDLER:    Right, we are -- we are  
13    focusing on --

14                    CHIEF JUSTICE ROBERTS:    So the Government --  
15    the Government -- we don't have a position from the  
16    Government on whether or not there is an implied right  
17    of action under other constitutional provisions.

18                    MR. KNEEDLER:    Under --

19                    CHIEF JUSTICE ROBERTS:    I mean, outside the  
20    Spending Clause context.

21                    MR. KNEEDLER:    We are certainly not  
22    challenging the existence of a cause of action at  
23    equity.  I'm -- I'm just -- I think we would view it as  
24    a cause of action in equity rather than implied under  
25    the Supremacy Clause, but I think you may -- you might



1 get to the same place, but I think it is judicial  
2 creation of a cause of action. But if I could before my  
3 time expires --

4 JUSTICE SCALIA: You -- you do not even  
5 exclude all Spending Clause cases. You only exclude  
6 those Spending Clause cases where -- where the plaintiff  
7 does not say we are -- you know, we're going to violate  
8 the State law, and they're going to come after us. So  
9 you haven't made an exception for the Spending Clause.

10 MR. KNEEDLER: Well -- I don't think there's  
11 any categorical rule because, for example, under  
12 Spending Clause cases, you can have rights enforceable  
13 under 1983. Our basic point is the Spending Clause is a  
14 contractual relationship between the Federal Government  
15 and the State, and the Respondents here are in the  
16 position of the people asserting rights as third-party  
17 beneficiaries to the bilateral relationship between the  
18 United States and the -- and the States. Under standard  
19 contract law principles --

20 JUSTICE KAGAN: But, Mr. Kneedler --

21 MR. KNEEDLER: -- the third-party can sue  
22 only if the parties intended him to be.

23 JUSTICE KAGAN: Mr. Kneedler, this is what  
24 you said in your cert stage brief: You said, "Those  
25 programs in which the drastic measure of withholding all

1 or a major portion of the Federal funding is the only  
2 available remedy" -- and you are talking here about  
3 Spending Clause programs, obviously -- "would be  
4 generally less effective than a system that also permits  
5 awards of injunctive relief in private actions."

6 MR. KNEEDLER: Yes, and the circumstances in  
7 which the Court has made that point and we agree with  
8 are often in situations where you have Title 6, Title 9  
9 instances of individual discrimination that are arising  
10 under Federal programs, or where you have a right under  
11 1983 where -- where there is an enforceable right that a  
12 party has and is going into court and is supplementing  
13 the agency's oversight.

14 Here, under -- under paragraph 30(A), you  
15 have only general standards that are really suitable for  
16 administrative review, balancing general --

17 JUSTICE KAGAN: But can that really be the  
18 difference? I mean, do you think if 30(A) were  
19 written -- were drafted as a formula, a rate schedule  
20 formula, that there would be a cause of action, but  
21 because 30(A) is more general in nature, that there is  
22 no cause of action? I mean, surely that's a question  
23 for the merits of whether there is pre-emption or not.

24 MR. KNEEDLER: Well, I -- I don't think it's  
25 just a merits question. I think it also goes to the

1 question whether the parties to the contract intended  
2 third-party beneficiary-type rights to be able to sue  
3 under -- under a -- what is really analogous to a  
4 contract.

5 I would also point out that this Court's  
6 decision in *Maine v. Thiboutot*, which first recognized a  
7 1983 cause of action, pointed to prior cases enforcing  
8 Social Security programs, on the assumption that 1983  
9 could have been the only source of the cause of action.  
10 If there was an implied judge-made cause of action in  
11 those circumstances, that assumption would have been  
12 unwarranted.

13 JUSTICE GINSBURG: Mr. Kneedler, before you  
14 sit down, could you please enlighten us on two fact  
15 points? One is, what is the status of the 30(A)  
16 rulemaking? I take it once the rule is made, it would  
17 get Chevron deference. You said that there would be a  
18 final rule in December. Is that still --

19 MR. KNEEDLER: I am informed that it may  
20 slip past December, that there -- there has been a lot  
21 of interaction with -- with comments on it. I don't  
22 know a precise date, but I'm informed that that may be  
23 possible.

24 JUSTICE GINSBURG: How about the -- the  
25 status of the -- the hearing on California's

1 compliance --

2 MR. KNEEDLER: That is -- that is still  
3 pending. There have been extensions. There have also  
4 been planned amendments that have been submitted  
5 covering some of these same regs.

6 Justice Ginsburg, I also wanted to respond  
7 to one of your questions. I do believe the United  
8 States would have an injunctive action in certain  
9 circumstances. For example, if the United States  
10 disapproved a plan and the State continued to -- a plan  
11 amendment, and a State continued to follow the terms of  
12 the disapproved plan amendment, I think the United  
13 States would have a cause of action to enforce --

14 JUSTICE KENNEDY: Under the --

15 MR. KNEEDLER: -- as the party to the  
16 contract.

17 JUSTICE KENNEDY: Under a pre-emption --  
18 would it be a pre-emption argument?

19 MR. KNEEDLER: No, it would be enforcing the  
20 -- the terms of its agreement with the -- with the  
21 States.

22 JUSTICE KENNEDY: Do you --

23 MR. KNEEDLER: It doesn't have to rely on  
24 pre-emption in those circumstances.

25 JUSTICE KENNEDY: Do you agree with the

1 counsel for the Petitioner that if the State chose to  
2 allow its courts to issue an injunction on Supremacy  
3 Clause grounds in the State courts, that that would be  
4 impermissible?

5 MR. KNEEDLER: We think it's a harder  
6 question, but probably so, because we believe paragraph  
7 38 does not confer private rights, and that would be  
8 true in the State court as well as Federal court.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
10 Kneedler.

11 Mr. Phillips.

12 ORAL ARGUMENT OF CARTER G. PHILLIPS

13 ON BEHALF OF THE RESPONDENTS

14 MR. PHILLIPS: Thank you, Mr. Chief Justice  
15 and may it please the Court:

16 I'd like to focus on two points that came  
17 out of the questioning in the first part of the oral  
18 argument today.

19 First of all, I would like to focus on the  
20 question -- the comment, at least, and the question that  
21 flows from it, from Justice Alito, which is that there  
22 has never been a recognition of a cause of action in any  
23 Ex parte Young case. And that's a hundred percent true,  
24 and I didn't hear response to the other side that  
25 suggests anything to the contrary.

1           And the reason for that is, obviously, what  
2   this Court said in the Verizon case and what it said in  
3   Shaw is that you look to the Supremacy Clause as the  
4   basis for arising-under jurisdiction, and then if you  
5   have jurisdiction, then you look to the traditional  
6   equitable standards to determine whether they've been  
7   satisfied in a particular case.

8           And under this Court's decision in *Ex parte*  
9   Young, what the Court said was "an injunction which  
10   restrains the state officer from taking any steps  
11   towards the enforcement of an unconstitutional  
12   enactment, to the injury of the complainant" is the  
13   basis for relief. And that's exactly the circumstance  
14   that we have in this case, and thus --

15           CHIEF JUSTICE ROBERTS: Why isn't -- why  
16   doesn't your position constitute a complete end run  
17   around all of our implied right of action jurisprudence?  
18   We've wasted a lot of time trying to figure out whether  
19   there's an implied right of action under a particular  
20   statute if there has always been one under the Supremacy  
21   Clause?

22           MR. PHILLIPS: Mr. Chief Justice, there is a  
23   very fundamental difference between an implied right of  
24   action or an action under section 1983 and -- and a very  
25   simple and straightforward *Ex parte* Young remedy that's

1 otherwise available. Under 1983, at private rights of  
2 action, the district courts, the Federal courts, State  
3 courts for that matter in enforcing them, have authority  
4 to grant damages, they have much broader injunctive  
5 relief, and under section 1983, there's --

6 CHIEF JUSTICE ROBERTS: How can they have  
7 much broader -- broader -- first of all, all of those  
8 cases -- I don't know if all of them did, but certainly  
9 a lot of them did include -- included claims for  
10 injunctive relief. And I would have thought the court's  
11 authority under your equitable action under the  
12 Constitution would be at least as broad as it would be  
13 under the statute.

14 MR. PHILLIPS: Well, Ex parte Young has been  
15 pretty consistently evaluated as saying simply you  
16 cannot do what the Constitution immediately prohibits  
17 you from doing. And so, frankly, the Ex parte Young  
18 remedy has been a negative --

19 CHIEF JUSTICE ROBERTS: But your position --

20 MR. PHILLIPS: -- not to violate the --

21 CHIEF JUSTICE ROBERTS: Your position --

22 MR. PHILLIPS: -- not to violate the  
23 Supremacy Clause.

24 CHIEF JUSTICE ROBERTS: Your position is  
25 that the Constitution prohibits you from doing anything

1 where the State law is pre-empted by the Federal law.

2 That doesn't sound very narrow to me.

3 MR. PHILLIPS: Well, but -- but if you go  
4 back and look at the cases in which 1983 relief has been  
5 involved, a case like Blessing -- in Blessing, the  
6 complaint there sought essentially to take over the  
7 entire State law function of providing support for  
8 children. And that was the injunctive relief that was  
9 requested. And if the Court had adopted the notion that  
10 1983 carried with it a private right of action, that  
11 would have been available relief; there would have been  
12 a claim for damages in that circumstance; and there  
13 would have been access to attorneys' fees.

14 CHIEF JUSTICE ROBERTS: What if the --

15 MR. PHILLIPS: None of those things is  
16 available here.

17 CHIEF JUSTICE ROBERTS: What if the law that  
18 Congress is -- Congress passes sets forth certain  
19 Federal standards -- it's a cooperative Federal-State  
20 law like this one -- and it says: And there's no  
21 private right of action for any individual to enforce  
22 this. That's limited to the Federal Government.

23 MR. PHILLIPS: In that -- in that situation,  
24 there's obviously no authority to bring a private right  
25 of action under the statute. That still doesn't answer



1 the question whether or not there is a right to invoke  
2 the Supremacy Clause --

3 CHIEF JUSTICE ROBERTS: So Congress can  
4 say --

5 MR. PHILLIPS: -- when there's a conflict  
6 between Federal and State law.

7 CHIEF JUSTICE ROBERTS: Congress can say in  
8 the same statute that confers the allegedly pre-emptive  
9 Federal standards that we do not want individuals  
10 bringing actions in court to enforce this. We want to  
11 leave that up to HHS. And you're saying, even though  
12 Congress said that, individuals can nonetheless bring a  
13 suit under the Supremacy Clause, the theory of which is  
14 we are making sure that Federal law controls.

15 MR. PHILLIPS: Right.

16 CHIEF JUSTICE ROBERTS: The same Federal law  
17 that says you can't bring a cause of action.

18 MR. PHILLIPS: No, I understand that,  
19 Mr. Chief Justice, but you still have the problem that  
20 even under those circumstances, a regime can arise in  
21 which there is a square and, in this case, you know, I  
22 think undeniable, conflict between Federal and State  
23 law, and the question is -- and that that conflict  
24 imposes not only injury in fact to an individual but  
25 also imposes irreparable harm.

1 JUSTICE GINSBURG: But you're saying then,  
2 if Congress loud and clear says, we want HHS to be the  
3 sole enforcer of this law, you're saying--

4 MR. PHILLIPS: Of the Federal statute.

5 JUSTICE GINSBURG: Of this, yes. You're  
6 saying that that would be ineffective because there  
7 could still be a Supremacy Clause claim.

8 MR. PHILLIPS: Yes. Whether or not you  
9 would in fact get relief under the Supremacy Clause  
10 seems to me a very --

11 JUSTICE GINSBURG: That's on the merits --

12 MR. PHILLIPS: -- close question.

13 JUSTICE GINSBURG: -- but Congress says, we  
14 don't want anybody coming into the court. We want --

15 MR. PHILLIPS: I don't think Congress has  
16 the authority to essentially say there are some  
17 conflicts between Federal and State law that we will  
18 simply ignore even though it causes irreparable harm --

19 JUSTICE KAGAN: Is that necessary to your  
20 position, Mr. Phillips?

21 MR. PHILLIPS: Absolutely not, Justice  
22 Kagan. Go ahead.

23 JUSTICE KAGAN: Because you could take the  
24 view, right, that if Congress speaks to cut off a claim,  
25 that's one thing, and a very different thing, than if

1 Congress has not spoken at all.

2 MR. PHILLIPS: Right. And it seems to me  
3 here is a situation where you would expect Congress to  
4 have spoken explicitly --

5 JUSTICE GINSBURG: Then it's a question of  
6 what will be the default rule. Congress is silent.

7 MR. PHILLIPS: Of course.

8 JUSTICE GINSBURG: Is the default rule that  
9 there is a Supremacy Clause action or that Congress must  
10 expressly allow it?

11 MR. PHILLIPS: And the reason why the  
12 default rule would almost certainly be that in fact you  
13 can bring the Ex parte Young cause of action is because  
14 the effect -- the Spending Clause has been subject to  
15 the -- to pre-emption claims since 1968. This whole  
16 notion that they contracted against this background of  
17 what obligations did they assume -- the obligation that  
18 they clearly would have assumed is that if in fact there  
19 is a violation of Federal law based on a failure to  
20 satisfy one of the conditions of spending under these  
21 circumstances, you would -- they would be susceptible to  
22 an Ex parte Young --

23 JUSTICE BREYER: Why?

24 MR. PHILLIPS: -- injunctive action.

25 JUSTICE BREYER: I'm -- I'm not certain, as

1 I find this a difficult case. It seems to me the  
2 Government is prepared to concede that if an individual  
3 has a Federal right that he'd like to enforce and  
4 someone is trying to block it by asserting a State law  
5 that he thinks is pre-empted, he can go ahead. If it  
6 looks as if the State is going to take something from  
7 him that a Federal law guarantees and he has a defense  
8 that he'd like to make to that under Federal law, the  
9 State law that seems to allow it is pre-empted, he can  
10 make it.

11 Our problem arises where neither of those  
12 things is true. So, we say, what is true here? What  
13 kind of Federal claim does he have? And the word is  
14 that rates have to be -- that the rate that the State  
15 has to pay back to the doctor has to be "sufficient."  
16 Okay, "sufficient." That's basically the word.

17 MR. PHILLIPS: Right.

18 JUSTICE BREYER: All right. So, I see three  
19 possibilities. One is you say, sure, let all the  
20 doctors go and sue. There are only 50,000 kinds of  
21 reimbursement. Maybe there are a million. I don't know  
22 how many. And they only take place in like, say,  
23 400,000 counties. And we will have Federal judges  
24 reaching different views about what is sufficient in  
25 each of those different places. And sometimes they will

1 agree. Did Congress want that? Well, hmm, a problem.

2 The second way of going about it is cure  
3 that and say: You win, but you have to use primary  
4 jurisdiction, and you have to get the government's view  
5 on it, Judge; and before you decide, you have to pay  
6 attention.

7 MR. PHILLIPS: Can I --

8 JUSTICE BREYER: There's a long line of  
9 cases. I have one more thing --

10 MR. PHILLIPS: Can I --

11 JUSTICE BREYER: -- then you'll get all  
12 three.

13 MR. PHILLIPS: But can I deal with that one  
14 immediately?

15 JUSTICE BREYER: Yes.

16 MR. PHILLIPS: Because I think it's  
17 important in the context of this case to recognize it.  
18 We're talking about the issuance of a preliminary  
19 injunction that was designed to hold everything until  
20 matters could be avoided. We realize that we're talking  
21 about a situation where the State, solely for budgetary  
22 reasons, without regard to Federal law whatsoever,  
23 simply made a slash in the reimbursements.

24 JUSTICE BREYER: If I want your view, I want  
25 your view on whether the right approach -- you're saying

1     what's the status quo pending. And I want your view on  
2     these three possibilities.

3                     MR. PHILLIPS: Right. I --

4                     JUSTICE BREYER: One is the possibility the  
5     judges just do it in all the different places, try to  
6     figure out what's sufficient. The second is the  
7     possibility that we try primary jurisdiction, and that's  
8     the -- then the curlicue on that is what do you do  
9     pending? And, you know, that's your injunction.

10                    MR. PHILLIPS: And that's what I just want  
11     to be clear on.

12                    JUSTICE BREYER: Yes, yes. And the third  
13     possibility is you say: I'm so sorry that the -- this  
14     is just too vague, the "sufficient" et cetera. It has  
15     to be centralized. There's no way to work this out with  
16     all these different judges and different kinds of rates  
17     and different kinds of provisions. And so this is an  
18     instance where you cannot bring your claim that  
19     something violates the Supremacy Clause because you  
20     don't have a Federal right to a thing, and they're not  
21     trying to take away a thing that the Federal right gives  
22     you, et cetera.

23                    All right. Do you see those three  
24     possibilities?

25                    MR. PHILLIPS: Right.

1 JUSTICE BREYER: And what I wanted you to do  
2 is to address them.

3 MR. PHILLIPS: The -- the third possibility,  
4 it seems to me, Justice Breyer, is not much different  
5 from a lot of the other cases that this Court has  
6 already decided --

7 JUSTICE BREYER: Yes.

8 MR. PHILLIPS: -- like Crosby and like  
9 Engine Manufacturers, where there's the vague standard  
10 out there, and the -- and it doesn't -- and they're not  
11 asserting a right to be -- not to have an enforcement  
12 action brought against them. And this Court has  
13 routinely held in that circumstance that there is in  
14 fact a Supremacy Clause action available. So, I don't  
15 think the third option is really an option. And it also  
16 ultimately goes to the merits of the pre-emption claim.

17 If it turns out that all of this is just too  
18 squishy to evaluate, then it would seem to me that on  
19 the merits, then you would say there's not a clear  
20 enough statement of Federal law to justify saying  
21 there's a conflict that would -- and, therefore, you  
22 would lose on the merits. But that wouldn't prevent you  
23 from going into court and trying to make the kind of  
24 showing that we made here.

25 JUSTICE BREYER: You think primary

1 jurisdiction is the way to do it.

2 MR. PHILLIPS: Yes.

3 JUSTICE BREYER: You see, I see a practical  
4 problem, and the practical problem is millions of rates  
5 all judged by the term "sufficient," and instead of the  
6 agency in charge deciding what's sufficient, we do have  
7 a lot of judges.

8 MR. PHILLIPS: But, Justice Breyer, the  
9 agency always has the ultimate authority here to step in  
10 and take action. And I think the real question is, is  
11 it reasonable to think that Congress meant to place this  
12 in an agency, to circumstances where the agency isn't  
13 going to receive notice of the implementation of the  
14 change before it gets implemented, where the State is  
15 permitted to take no -- to make no response to a request  
16 for information and allow the unlawful rates to go into  
17 effect for years on end?

18 JUSTICE KAGAN: So could I ask --

19 JUSTICE SOTOMAYOR: Fighting -- why are you  
20 fighting Justice Breyer so much?

21 MR. PHILLIPS: I didn't think I was.

22 JUSTICE SOTOMAYOR: I mean, it sounds like  
23 you are, and that's why I am having some difficulty.

24 There are two points, following up on his  
25 and then my second question. Engage the Solicitor



1 General's suggestion that this isn't a cause of action  
2 under the Supremacy Clause, but that it is a cause of  
3 action under some implied equitable --

4 MR. PHILLIPS: Doctrine.

5 JUSTICE SOTOMAYOR: -- doctrine, okay?  
6 Which may square. And I'm now coming back to Justice  
7 Breyer's question. I agree with all you were trying to  
8 say about what the State did or didn't do here, but if  
9 it's a primary jurisdiction question, what's wrong with  
10 just saying that the court's power is limited under  
11 equity to issuing an injunction that gives the matter  
12 over to the administrative agency that puts in the  
13 status quo -- assuming there's some sort of violation of  
14 Federal law or seeming violation of Federal law -- a  
15 preventive injunction that just stops the State from  
16 acting until the administrative process concludes?

17 MR. PHILLIPS: Justice Sotomayor --

18 JUSTICE SOTOMAYOR: What's wrong with that?

19 MR. PHILLIPS: There's nothing wrong with  
20 that. Candidly, we -- we would be perfectly comfortable  
21 about that, but I don't understand the other side to be  
22 complaining about the scope of the injunctive relief.  
23 It is not that they are saying --

24 JUSTICE SOTOMAYOR: No, no. They're saying  
25 you can't have any.

1 MR. PHILLIPS: Right. And so --

2 JUSTICE SOTOMAYOR: But -- but Justice  
3 Breyer's question, I think, was slightly different,  
4 which is, what's the limit on --

5 MR. PHILLIPS: Right.

6 JUSTICE SOTOMAYOR: -- the court's power?  
7 And how do you --

8 MR. PHILLIPS: Well, we did have an  
9 alternative argument that the injunction should --  
10 should stay into effect at least until HHS acts, and the  
11 -- the district court granted a broader preliminary  
12 injunction and didn't consider the alternative argument  
13 that was -- that was there.

14 But, again, it seems to me, you know, the  
15 court ought to recognize that you're in the context of  
16 preliminary injunctive relief in this situation, and --  
17 and there will be plenty of time to kind of work through  
18 the nature of the injunctive relief if in fact the  
19 court's allowed to go forward and take up the Ex parte  
20 Young issue under the circumstance.

21 JUSTICE SOTOMAYOR: But you engaged the  
22 question that -- the approach the Solicitor General has  
23 been making, which is don't find a cause of action under  
24 the Supremacy Clause; find it in the court's -- an  
25 implied cause of action.

1                   MR. PHILLIPS: I'm not perfectly comfortable  
2 with that rationale. I think the answer is it's sort of  
3 a combination of the Supremacy Clause and the -- and  
4 broad equitable relief, rather than -- I mean, clearly  
5 one or the other. They seem to go pretty much  
6 hand-in-glove in the ex parte line of cases. And so I  
7 don't have any particular problem with that.

8                   JUSTICE SOTOMAYOR: Well, I might, if you  
9 continue in your earlier position that a Supremacy  
10 Clause cause of action would stop Congress from having a  
11 -- a voice in enforcement in cutting it off clearly, if  
12 Congress were to write a law that says no one can  
13 enforce this, either in damages or in injunctive relief.  
14 Your earlier answer seemed to suggest Congress didn't  
15 have the power under the Supremacy Clause to do that.

16                  MR. PHILLIPS: Well, I -- suppose there  
17 were --

18                  JUSTICE SOTOMAYOR: If this were in  
19 equity --

20                  MR. PHILLIPS: It will depend on the -- on  
21 the circumstances of the case, but I do think there is  
22 some gap between the full extent of Congress's power in  
23 this area and -- and the protections of the Supremacy  
24 Clause, if for no other reason -- and because the  
25 executive branch also has the authority and, certainly

1 acting within its own exclusive authority, could --  
2 could pre-empt State law or could create a situation  
3 where State law would be pre-empted. And I don't think  
4 Congress would have the authority to -- to take away the  
5 Ex parte Young remedy under -- under those particular  
6 circumstances.

7 JUSTICE ALITO: What is your response to the  
8 argument that the equitable power exercised in Ex parte  
9 Young and similar cases is limited to certain specific  
10 situations such as where there is an imminent threat of  
11 the State enforcement action, and a few others where  
12 there's a trespass, where there's a clearly defined  
13 Federal right? I mean, it doesn't encompass every  
14 situation in which the plaintiff simply has Article III  
15 standing and wants to obtain an injunction that a  
16 particular State law is pre-empted by Federal law.

17 MR. PHILLIPS: The -- I mean, to be sure,  
18 the Court in Ex parte Young was dealing with a specific  
19 situation in trying to prevent enforcement. But the --  
20 the Supreme Court -- this Court in all of its decisions  
21 post-Ex parte Young has never said that that's the only  
22 circumstance and has certainly never said that in  
23 exercising the judicial power under Article III that  
24 extends to all cases in equity, that it means only the  
25 equity that existed in -- in the 18th century at that

1 point in time.

2                   So, it seems to me the right answer at this  
3 stage is for this Court to look at the situation and  
4 say: Is this a context in which equitable relief would  
5 be appropriate? And if you just use the preliminary  
6 injunction standards, it clearly would be appropriate  
7 under -- under these particular circumstances, where we  
8 have a likelihood of success on the merits, irreparable  
9 harm, and the balance of harms favor the -- favor the  
10 plaintiff.

11                   JUSTICE BREYER: Right.

12                   JUSTICE KENNEDY: So, what is the best  
13 authority in our cases, other than Ex parte Young, or in  
14 a treatise or in recognized statements of the difference  
15 in law and equity for the proposition that in this area  
16 we can make a distinction between law and equity after  
17 centuries in which we have tried to say that that  
18 distinction ought to be blurred?

19                   MR. PHILLIPS: Well --

20                   JUSTICE KENNEDY: I mean, do you want us --  
21 do you want us to write an opinion and say, oh, there is  
22 a difference in damages at equity?

23                   MR. PHILLIPS: Well, all -- all we --

24                   JUSTICE KENNEDY: What do I -- other than Ex  
25 parte Young, what do I cite for that?

1 MR. PHILLIPS: Well, any of the cases in  
2 which the Court has recognized that obviously in order  
3 to get -- in order to get injunctive relief, you have to  
4 demonstrate that there's -- that there's no adequate  
5 remedy at law. So, I mean, the distinction has always  
6 been there, even after the merging of law and equity --

7 JUSTICE SCALIA: That -- that's not --

8 MR. PHILLIPS: -- in the early part of the  
9 last century.

10 JUSTICE SCALIA: That's not the theory on  
11 which we've said you can't get damages under *Ex parte*  
12 *Young*. The theory that prevents damages is the theory  
13 of sovereign immunity. The -- the fiction that  
14 you're -- that you're moving against the individual and  
15 not against the State simply cannot be maintained when  
16 you're taking money out of the State treasury. That's  
17 the basis for it, not -- not what you just described.

18 MR. PHILLIPS: No, but I'm -- but I'm not  
19 asking for -- for -- I mean, we're not asking for  
20 damages here, Justice Scalia.

21 JUSTICE KENNEDY: I know, but see --

22 MR. PHILLIPS: All we're asking for  
23 is injunctive relief.

24 JUSTICE KENNEDY: But that -- but that  
25 wouldn't explain the case like *Gonzaga* where there was

1 no State entity. Gonzaga was a private institution.

2 MR. PHILLIPS: Right. But --

3 JUSTICE KENNEDY: So I'm -- I'm wondering.

4 I understand the Eleventh Amendment dynamic, which --

5 MR. PHILLIPS: Right.

6 JUSTICE KENNEDY: -- as Justice Scalia  
7 points out, was the whole driving force of -- of Ex  
8 parte Young. Is there -- is there any other basis for  
9 us to say that there has to be a law/equity distinction?  
10 You say, well, that's because there is no adequate  
11 remedy at law. But that's circular; that assumes  
12 because there's no cause of action -- so that doesn't  
13 work.

14 MR. PHILLIPS: No, but I -- I mean, all of  
15 the cases that come out of the Ex parte Young line of  
16 authority seem to base -- you know, they all tee up,  
17 obviously, the problem that exists in this context,  
18 which is -- which is the one that Justice Scalia  
19 identified.

20 JUSTICE BREYER: There must be a limit.  
21 There must be a limit because if there is not a limit on  
22 what you can do under Ex parte Young, I can go in my  
23 office and I look at the statute books and they are just  
24 filled with statutes, and I -- Federal; and if I had all  
25 the State statute books, it would be 15 offices or 20 or

1    100.    And I know perfectly well that a lot of those  
2    statutes in the Federal books have to do with agencies,  
3    and they give jobs to agencies, and it's perfectly  
4    apparent that the ones who run those statutes in many  
5    instances are the agencies, and really judges are out of  
6    it.

7                    Now, if I adopt your line, it seems to me I  
8    am saying that any time that a person has an individual  
9    of saying that a State law is contrary to one of those  
10   statutes, he can run right into court.    And I can see  
11   we've done that where he has some kind of right that  
12   he's protecting that's threatened in some way or that he  
13   wants to assert.    I can see that we could do that in the  
14   foreign policy case like Burma; I can see that we could  
15   do that where Federal voting rights are at stake, which  
16   are very important.

17                   But a principle that says you can do that  
18   any time you want seems to me a little -- it's -- it  
19   seems to me the real fear of far-reaching in the extent  
20   that it just stops the agency from doing their business  
21   at the behest of anyone who would like to assert a State  
22   law, or States -- it's a mess, in other words.

23                   MR. PHILLIPS:    Justice Breyer, can I -- two  
24   points here:    First of all, we are not talking about a  
25   situation of somebody seeking a roving commission to go



1 find out all Federal -- all situations where State law  
2 violates Federal law. We're -- the beneficiaries in  
3 this case --

4 JUSTICE BREYER: No, no. Your people have  
5 your problem.

6 MR. PHILLIPS: But those are life-and-death  
7 problems.

8 JUSTICE BREYER: But some other people have  
9 another problem.

10 MR. PHILLIPS: But my people have a  
11 life-and-death problem, Justice Breyer. So if there  
12 were ever a situation where you would say let's look to  
13 see whether or not there is relief available, this would  
14 be the situation where -- where I would hope --

15 JUSTICE BREYER: The doctors want to be paid  
16 more money or at least not paid as much as they were, I  
17 understand that.

18 MR. PHILLIPS: But the beneficiaries --

19 JUSTICE BREYER: Yes.

20 MR. PHILLIPS: The patients are the one who  
21 lose access to --

22 JUSTICE BREYER: So is there a medical  
23 exception?

24 MR. PHILLIPS: I'm sorry.

25 JUSTICE BREYER: Is there a medical

1 exception? Is it that you can have this generalized  
2 claim if you're a doctor, but not others?

3 MR. PHILLIPS: No, to be sure, Justice  
4 Breyer. The exception is that we have to satisfy the  
5 requirements of Article III. We have to have injury and  
6 redressability, and in order to get equitable relief, we  
7 ultimately are going to have to demonstrate that the  
8 injury is irreparable, that there is no adequate remedy  
9 at law. Those are high burdens --

10 JUSTICE KAGAN: Mr. Phillips --

11 MR. PHILLIPS: -- and in a circumstance  
12 where you cannot get damages and you cannot get  
13 attorneys' fees.

14 JUSTICE KAGAN: Mr. Phillips, could I ask  
15 you a little bit more about how this interacts with the  
16 agency process? Now, suppose that California had done  
17 what, the way I read the statute, it was supposed to do,  
18 which is to go to the agency and say: We want to change  
19 our rates. We can't afford these rates anymore, and we  
20 think these lower rates would do just as well. All  
21 right?

22 And then the agency and California sit down  
23 and discuss the matter. Would this suit have ever come  
24 into being?

25 MR. PHILLIPS: If they had just discussed

1 the matter?

2 JUSTICE KAGAN: You know, they did not  
3 impose them unilaterally. They go to the -- to HHS and  
4 they wait for HHS to approve what they want to do. If  
5 HHS approves --

6 MR. PHILLIPS: We wouldn't be here. I can  
7 guarantee you we wouldn't be here.

8 JUSTICE KAGAN: Well, if -- if HHS approved,  
9 maybe somebody does sue. And then there's great  
10 deference to the agency --

11 MR. PHILLIPS: That's --

12 JUSTICE KAGAN: -- isn't that right?

13 MR. PHILLIPS: That's exactly right.

14 JUSTICE KAGAN: And if HHS doesn't approve,  
15 then what's there to talk about? There's no suit.

16 MR. PHILLIPS: Right. So there's no  
17 question that --

18 JUSTICE KAGAN: So either way, the agency  
19 wins, right?

20 MR. PHILLIPS: Right. The agency always  
21 wins. That's the rule that they --

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Why is there no --

24 MR. PHILLIPS: But then the question --

25 CHIEF JUSTICE ROBERTS: Why is there no suit

1 if the agency doesn't approve?

2 MR. PHILLIPS: Well, I mean -- I mean, if  
3 the agency --

4 CHIEF JUSTICE ROBERTS: You're saying  
5 Congress can't say there's no implied right of action.

6 MR. PHILLIPS: Right.

7 CHIEF JUSTICE ROBERTS: But the agency can?

8 JUSTICE KAGAN: Well, if the -- I was just  
9 saying if the agency didn't approve, your clients don't  
10 have anything to complain about.

11 MR. PHILLIPS: Right, because -- well --

12 CHIEF JUSTICE ROBERTS: Do you have the same  
13 answer or a different one?

14 MR. PHILLIPS: -- I mean, I suppose it  
15 depends on whether they go ahead, and if California, in  
16 the face of disapproval, continues to violate the law,  
17 that would -- I assume you meant that California  
18 complied.

19 JUSTICE KAGAN: Correct.

20 JUSTICE ALITO: What about the agency  
21 approves rates and someone is dissatisfied with the  
22 rates sues and says these rates are ridiculously low?

23 MR. PHILLIPS: Oh, you can bring a  
24 lawsuit --

25 JUSTICE ALITO: They still can sue --

1                   MR. PHILLIPS: -- Justice Alito. The -- the  
2     bottom line is you're going to lose that -- that  
3     litigation and in a circumstance where you have no  
4     realistic prospect of --

5                   JUSTICE ALITO: Well, how do you know  
6     they're going to lose the litigation? Why should they  
7     lose the litigation if it's really -- if there really is  
8     a cause of action there? Some of the Medicaid rates are  
9     very low, aren't they?

10                  MR. PHILLIPS: Well, ultimately, you they  
11     have to demonstrate that there's -- that there is a --  
12     by clear and convincing evidence, a conflict between  
13     Federal and the State law. And the agency that has --  
14     that evaluates the standards of Federal law will have  
15     said in a very authoritative way that there is not a  
16     violation under those circumstances.

17                  CHIEF JUSTICE ROBERTS: But you still have a  
18     cause of action under the Supremacy Clause.

19                  MR. PHILLIPS: Oh, no, to be sure, I have a  
20     cause of action.

21                  CHIEF JUSTICE ROBERTS: I thought you were  
22     saying you didn't --

23                  MR. PHILLIPS: No, no.

24                  CHIEF JUSTICE ROBERTS: -- if the agency --

25                  MR. PHILLIPS: No, no. I'm not saying you

1 don't, I'm just -- all I'm saying is that if the -- if  
2 the process works appropriately, there would be not the  
3 litigation that Justice Breyer was worried about, where  
4 you would have hundreds of thousands of cases going  
5 forward.

6 If the process -- which, again, it goes back  
7 to the default rule.

8 JUSTICE SCALIA: You've lost me here. You  
9 -- you say there would be a cause of action under the  
10 Supremacy Clause if the agency approves the rates, but  
11 your clients don't think the rates are high enough?

12 MR. PHILLIPS: Sure, we would still say  
13 there's a --

14 JUSTICE SCALIA: Under the --

15 MR. PHILLIPS: We would still have an  
16 argument that there's a conflict between Federal and  
17 State law.

18 JUSTICE SCALIA: Well, Federal law is  
19 determined by the agency, surely. So long as the agency  
20 is complying with the Administrative Procedure Act, I  
21 don't see how you have any --

22 MR. PHILLIPS: Well --

23 JUSTICE SCALIA: -- any cause of action  
24 under the Supremacy Clause; you may have an APA cause of  
25 action.

1                   MR. PHILLIPS: Well, we -- well, the problem  
2 with the APA -- we might have an APA cause of action,  
3 but I also think that there is a -- I mean, I -- look,  
4 that hypothetical is so far afield --

5                   JUSTICE SCALIA: Federal law is not  
6 determined by the agency?

7                   MR. PHILLIPS: I'm sorry, Justice Scalia.

8                   JUSTICE SCALIA: Federal law is not  
9 determined by of the agency?

10                  MR. PHILLIPS: No, of course, Federal law is  
11 determined by the agency --

12                  JUSTICE SCALIA: Well, then you don't have a  
13 Supremacy Clause cause of action.

14                  MR. PHILLIPS: Well, I think you -- I still  
15 think you can bring an action under the Supremacy  
16 Clause. I think, ultimately, you have very -- you have  
17 zero hope of prevailing --

18                  CHIEF JUSTICE ROBERTS: Why does the --

19                  MR. PHILLIPS: -- which was my point.

20                  CHIEF JUSTICE ROBERTS: Why does the agency  
21 get to determine Federal law when Congress doesn't? You  
22 told me earlier if Congress --

23                  MR. PHILLIPS: Because Congress --

24                  CHIEF JUSTICE ROBERTS: -- Congress says in  
25 a statute no implied right of action, that that doesn't

1 control.

2 MR. PHILLIPS: Right, but that doesn't --  
3 that controls to the extent of trying to enforce  
4 directly the Federal statute; it doesn't control with  
5 respect to trying to enforce the Supremacy Clause.

6 JUSTICE KENNEDY: The Supremacy Clause says  
7 that judges in every State shall be bound thereby, but  
8 if you want to amend it so that judges in every State  
9 and all administrators should be bound thereby, then you  
10 have a Supremacy Clause action against every Federal  
11 agency. That doesn't make sense.

12 MR. PHILLIPS: Well, no, but what the  
13 Supremacy Clause says is that Federal law will be  
14 supreme in all circumstances, notwithstanding State  
15 law --

16 JUSTICE KENNEDY: Number one, it doesn't say  
17 that. There's no -- it doesn't say "all circumstances."  
18 It doesn't say that.

19 MR. PHILLIPS: The Supremacy Clause -- well,  
20 I don't know of any exceptions in the Supremacy Clause  
21 where State law gets to remain supreme --

22 JUSTICE KENNEDY: I'm -- well, no. Justice  
23 Scalia's question was related to a Federal agency. The  
24 Federal agency does something that's inconsistent with  
25 the statute, arguably, and you say there's a Supremacy



1 Clause violation? That's novel.

2 MR. PHILLIPS: No, not -- not that -- not  
3 what the agency has done violates the Supremacy Clause;  
4 it's the State acting pursuant to what the agency has  
5 approved, that if you still thought it violated Federal  
6 law, would be a basis for seeking a Supremacy Clause  
7 action. But, no, Justice Scalia is right. The obvious  
8 -- the obvious solution to the immediate problem is to  
9 seek review of the decision by HHS and to -- and to  
10 follow it under those circumstances.

11 The -- the second point that I wanted to  
12 focus a little bit about, because it does seem to me --  
13 again, it goes to what are -- what should be the  
14 background principles that operate here. And a couple  
15 of Justices specifically raised the question of, you  
16 know, would this case be different if we were seeking to  
17 balance-bill -- that is, to bill the extent to which we  
18 were allowed to bill prior to the time that the State of  
19 California reduced by 10 percent, if we brought that  
20 lawsuit, would that be perfectly permissible?

21 And I understand California, I think, has  
22 suggested that it would be, and I heard Mr. Kneedler  
23 suggest that, well, there might be some additional  
24 issues there. But the reality is, is it seems to me  
25 that shows you just how unrealistic the -- the

1 distinction is in this particular case, because we're  
2 talking about individuals -- you know, the question is  
3 not, you know, how are you going to implement this down  
4 the road? The question is, what do you do with someone  
5 who is suffering a lack of access to vital medical care  
6 in a way that is irreparable? And is it realistic to  
7 think that Congress meant under those circumstances to  
8 deprive the individual plaintiff of any kind of rights?

9           And the answer is no. And that's -- that's  
10 as far as the Court needs to go. It doesn't need to  
11 figure out exactly how far Congress could deal with the  
12 Supremacy Clause. I realize that there is some  
13 skepticism on that score. But on the core question  
14 here, did Congress intend to deprive these plaintiffs of  
15 their rights under *Ex parte Young*, the answer is no --

16           CHIEF JUSTICE ROBERTS: The answer is yes,  
17 they intended to deprive them of the right to sue under  
18 the statute. I understand that you're not challenging  
19 the proposition that this statute, when Congress was  
20 specifically focused on the question of how to enforce  
21 this provision, they did not provide a right of action.  
22 And under our implied right of action jurisprudence,  
23 that means there isn't one.

24           So, why when they're confronted with the  
25 precise question did they say no, we don't want these

1 people to sue, but you say, well, they knew under the  
2 Constitution they were going to be able to anyway?

3 MR. PHILLIPS: Because -- because there is a  
4 difference between providing a private right of action  
5 and all the bells and whistles that go with that, as  
6 opposed to recognizing that Ex parte Young is the  
7 background principle that has been in place for well  
8 over a century and that says that when the -- when the  
9 standards for equitable relief are satisfied, the courts  
10 have the power, and they can prevent the violation of  
11 the Supremacy Clause.

12 JUSTICE GINSBURG: You said you would be  
13 satisfied with a limitation that the Court can issue an  
14 injunction pending the administrative procedure without  
15 going on to then the substance of the question, was  
16 there compliance with 30(A) by California?

17 MR. PHILLIPS: Yes, Justice Ginsburg, I  
18 would have been perfectly comfortable with that. I  
19 mean, that was one of the alternative grounds for relief  
20 that we sought. The district judge didn't happen to go  
21 down that particular path.

22 But, clearly, from our perspective, the  
23 important element is to maintain the status quo ante  
24 until a resolution of the legality of California's  
25 statute can be made, either by the agency or by the

1 courts. But the -- but the one thing you shouldn't be  
2 allowed to do is simply to -- to permit this to drift  
3 without any remedy and without any ability to get access  
4 to medical care that's clearly consistent with what  
5 Congress intended and where a remedy is available under  
6 the Ex parte Young formulation.

7 If there are no further questions, Your  
8 Honors, thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
10 Phillips.

11 Ms. Schwartz, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF KARIN S. SCHWARTZ

13 ON BEHALF OF THE PETITIONER

14 MS. SCHWARTZ: Thank you, Your Honor.

15 So, there are other provisions of the  
16 Medicaid Act that are privately enforceable. This one  
17 is not. I'd like to address the Court's questions about  
18 Ex parte Young. Ex parte Young, of course, involved a  
19 -- the Due Process Clause, not the Supremacy Clause, as  
20 the substance of the Constitution that was being  
21 enforced, and the plaintiff had an independent,  
22 free-standing property or personal right in Ex parte  
23 Young, in all of the cases that are its progeny.

24 Now, there's another -- I want to address  
25 Justice Alito's point about, do we apply the rights

1 language -- the rights requirement in Ex parte Young  
2 causes of action? Yes, you do. Alexander v. Sandoval,  
3 California v. Sierra Club, Blessing v. Freestone.

4 Look at Alexander v. Sandoval. The State  
5 passes a constitutional amendment that says English  
6 only. The -- the State adopts a policy, English-only  
7 drivers tests. This is challenged as conflicting with  
8 Federal law and specifically a Federal regulation. The  
9 Court said no -- no, Cort v. Ash was satisfied.  
10 Congress drafts statutes; it controls who gets to  
11 enforce them --

12 JUSTICE KAGAN: I'm sorry --

13 MS. SCHWARTZ: -- a right of action.

14 JUSTICE KAGAN: -- Ms. Schwartz. Are you  
15 saying -- this is the way I understood you, and tell me  
16 if I'm right: Are you saying that the test for  
17 determining whether there's a 1983 suit is the same as  
18 the test for determining whether there is an Ex parte  
19 Young action? Because you talked about, you know,  
20 whether somebody has a right, which is usually the  
21 language we use in the 1983 context.

22 MS. SCHWARTZ: No, I'm not. The test for  
23 whether there is an Ex parte -- and there's different  
24 meaning of Ex parte Young, but none of them apply here.  
25 You can see Ex parte Young as construing a cause of

1 action under the Due Process Clause. This not a cause  
2 of action under the Due Process Clause.

3 You could see Ex parte Young as involving a  
4 specific kind of bill in equity which is a defense of  
5 regulation of your conduct where that regulation  
6 infringes a personal or property right. That is not  
7 this case. There's no regulation of Respondents'  
8 conduct, and there's no infringement of a personal or  
9 property right in this case. The only entity that's  
10 being regulated by the State -- by the State statute  
11 that purportedly is being -- well, that is being  
12 challenged as pre-empted is the State of California  
13 itself because we are the entity that sets rates, and so  
14 the -- the statute tells the agency this is how you will  
15 set rates.

16 So, however you look at ex parte Young,  
17 plaintiffs cannot satisfy the elements of an Ex parte  
18 Young cause of action.

19 What I'm saying with respect to  
20 Alexander v. Sandoval and these other cases is injury is  
21 not enough. You have to have a -- a right. Under  
22 equity, injury has never been enough, and it's not  
23 enough under this Court's separation of powers decisions  
24 and its Spending Clause cases.

25 And I wanted to segue very quickly to this

1 idea that there's a default rule that a Supremacy Clause  
2 cause of action exists by default. That is absolutely  
3 not true, and it is not true in this context, and I'd  
4 like to identify two reasons.

5 First, the Suter fix. The -- Congress  
6 acted, and this Court in Suter said that there was no  
7 cause of action. And it said just because something is  
8 in a -- in a State plan doesn't render it unenforceable.  
9 But we want to preserve the holding in Suter.

10 Look, it -- that suggests that other things  
11 are unenforceable, that Congress is not legislating  
12 against a backdrop of an assumption that there's an  
13 injunctive relief claim, or it wouldn't have required  
14 it, is what Suter said. In *Maine v. Thiboutot*, another  
15 case that assumes -- that recognizes that with respect  
16 to Spending Clause actions, the sole means -- the  
17 Spending Clause statutes, the means, the vehicle for  
18 enforcing is 1983.

19 And, finally, in the Spending Clause  
20 context, we have the clear statement rule, which is  
21 incompatible with just an assumption that a cause of  
22 action always exists. Because the State has to have  
23 knowing and acceptance -- knowingly accepting -- accept  
24 its obligations, we require that there be a clear  
25 statement.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Counsel. The case is submitted.

4 (Whereupon, at 11:04 a.m., the case in the  
5 above-entitled matter was submitted.)

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